

IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS
Neff, J., presiding

TONY J. DANIEL
Plaintiff-Appellee,

v

Docket No. 120460

DEPARTMENT OF CORRECTIONS
Defendant-Appellant.

BRIEF ON APPEAL - AMICI CURIAE

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STATEMENT OF QUESTION PRESENTED

I

**WHETHER THE PREPOSITIONAL PHRASE *BY REASON OF* IN
MCL 418.305; MSA 17.237(305) ONLY MEANS *BECAUSE OF*.**

Plaintiff-appellee Daniel answers "No."

Defendant-appellant Department of Corrections answers "Yes."

Amici curiae Associations answer "Yes."

Court of Appeals answered "No."

Workers' Compensation Appellate Comm answered "Yes."

Bd of Magistrates answered "No."

STATEMENT OF FACTS

Plaintiff-appellee Tony J. Daniel (Employee) propositioned women. The women told defendant-appellant Department of Corrections (Employer). The Employer investigated and punished the Employee. The Employee then became depressed. (20a-21a)

The Employee filed an application for mediation or hearing with the Bureau of Workers' Disability Compensation (Bureau) claiming workers' disability compensation from the Employer for a mental disability. (5a) The Employer appeared and opposed the claim because the mental disability was *by reason of the intentional and wilful misconduct* of the Employee. (5a)

The Bureau remitted the case to the Board of Magistrates (Board) for hearing and disposition. (5a)

After hearing, the Board awarded the Employee weekly workers' disability compensation and medical care while absent from work because of the mental disability which was said to have been the result of the investigation and punishment by the Employer. *Daniel v State of Michigan, Dep't of Corrections*, unpublished order and opinion of the Board of Magistrates, decided on January 12, 1999 (Docket no. 011299209). (19a, 17a-18a)

The Workers' Compensation Appellate Commission (Commission) reversed because the investigation and punishment was *the direct result of [the] intentional and wilful misconduct* by the Employee to require the bar to workers' disability compensation described by a statute in the Workers' Disability Compensation Act of 1969, MCL 418.305; MSA 17.237(305). *Daniel v State of Michigan, Dep't of Corrections*, 1999 Mich ACO 3389, 3396. (25a)

The Court of Appeals granted leave to appeal, *Daniel v Dep't of Corrections*, unpublished order of the Court of Appeals, decided on June 21, 2000 (Docket no. 224423), and reversed because the Employee was not injured *at the time of* the misconduct. *Daniel v Dep't of Corrections*, 248 Mich App 95; 638 NW2d 175 (2001). (39a)

The Court then granted leave to appeal and allowed the Michigan Manufacturers' Association and Michigan Self-Insurers' Association (Associations) to participate as amici curiae. *Daniel v Dep't of Corrections*, 466 Mich 886; - NW2d - (2002).

ARGUMENT

I

THE PREPOSITIONAL PHRASE *BY REASON OF* IN MCL 418.305; MSA 17.237(305) ONLY MEANS *BECAUSE OF*.

The English language allows expressing the cause of an event in many different ways. The means is one way of expressing the cause for an event. Common and approved English expresses the means as the direct cause for an event by a noun which is introduced by the preposition *by*. For example,

We sold the car *by* advertising it in the newspaper.

This simple sentence establishes the cause for the event, which was the sale of the car, by describing the means, which was the ad in the newspaper, a noun that was introduced by the preposition *by*.

The instrument or mechanism is another way of expressing the cause for an event. Approved English expresses the instrument or mechanism as the cause for an event by a noun phrase which is introduced by a different preposition, *with*. For example,

She touched the lace *with* her fingers.

This simple sentence establishes the cause for the event of touching the lace by describing the instrument or mechanism, which was the finger, a phrase that was introduced by the preposition *with*.

The verb use and its object can convey the idea of an instrument as the cause for an event. Compare:

She opened the letter *with* a knife
and

She *used* a knife to open *the letter*.

Usually the person who caused an event is more important than the means or instrument. In standard English, the person or actor is usually specified by the subject of a clause or by the agent when a passive voice is used. For example,

John Smith started the fire

or

The fire was started by *John Smith*.

In the passive voice used in the second example, *started* is a causative verb and *John Smith* names the actor.

Many adjectives and intransitive verbs in English have a corresponding causative verb which may or may not follow in form. Examples of adjectives and intransitive verbs which follow the form of the causative verb include *open*, *grow*, and *blow up* such as,

The dam *blew up*. Terrorists *blew up* the dam.

An example of adjectives and intransitive verbs which do not follow the form of the causative verb include *fall* - *fell* such as,

The tree has *fallen*. John *felled* the tree.

Standard English allows indicating the cause for an event by using an adverbial clause that is introduced by the preposition *because*. For example,

The injury occurred *because* the machine was not repaired.

Here, the event, *the injury*, is explained by the adverbial clause *the machine was not repaired* which was introduced by the preposition *because*.

Other prepositions for cause include *for* and *through*. The use of these is directed by considerations of style. For example, the preposition *for* is usually used with nouns of emotion,

John Smith jumped *for joy*.

The preposition *through* is most appropriate with formal nouns such as,

Plaintiff appeared *through counsel*.

Standard English also allows expressing the cause for an event by a prepositional phrase which begins *because of*, *out of*, or *on account of*. For example,

John Smith stayed home *because of* the new baby.

The other prepositional phrases which equally convey the idea of the cause for an event are used because of style. For example, *out of* is best used to explain the motive or psychology of the actor such as,

John Smith took the job *out of* a sense of civic duty.

The prepositional phrase *on account of* is best used in a formal context,

Many auto collisions occur *on account of*
the drivers having consumed alcohol.

An equally proper prepositional phrase which conveys the idea of the cause for an event is *by reason of*. Every source for standard English and for standard American legal usage establishes this. *Webster's Dictionary of the English Language Unabridged, Encyclopedic Ed* (J G Ferguson Pub Co, 1977). *The American College*

Dictionary (Random House, 2001). *The Synonym Finder*, Rodale, J. I. (Warner Books, 1986). *A Dictionary of Modern Legal Usage* (2d Ed) (Oxford University Press, 1995). Webster's, 164, defines *because of* as *by reason of* stating that,

"**bē•cause**", *conj.* [ME. *because*, *bi cause*, *by cause*; *by*, *by*, and *cause*, *cause*.] *by cause*; *on this account*; *for the reason or cause that*; *since*.
because of; *by reason of*; *on account of*."

The more generally available *American College Dictionary*, 108, offers the prepositional phrase *for the reason that* as the first and most preferred definition of *because*.

The more general *Synonym Finder* says exactly the same. The *Synonym Finder*, 104, defines the adverbial use of *because* as *on account* or *by reason*.

The etymology of *because* is rooted in the Latin *causa*. The word *cause* was first used in the *Ancrene Riwe* in the Twelfth Century and derived from the Old French *cause* matter or thing and the learned borrowing from Latin *causa* for *reason*. *Dictionary of Etymology*, Barnhart, R., ed (Larousse Kingfisher and Chambers, 1988), 152. By the Fourteenth Century, Geoffrey Chaucer coined the word *by-cause* for use instead of *by reason of* or *cause*, and by 1425, the current spelling *because* replaced *bycause*. *Dictionary of Etymology*, 85. Clearly, there is a common and approved usage of the prepositional phrase *because of* and *by reason of* for five hundred years.

The usage of *by reason of* as a synonym for *because of* occurs in law. The *Dictionary of Modern Legal Usage*, 125, explains that, "*by reason of* is wordy for *because of*."

Plainly, the common and approved usage of the English language is that the prepositional phrase *by reason of* means *because of* and conveys exactly the same idea for the direct cause of an event. The difference is in style. *By reason of* is only formal usage of *on account of*.

Not surprisingly, the phrase *by reason of* is used in statutes which is the most formal of all English and perhaps, the most resistant to changes in style. The prepositional

phrase is found in a statute in the Workers' Disability Compensation Act of 1969 (WDCA), MCL 418.101; MSA 17.237(101), et seq. The statute states that, "[i]f the employee is injured *by reason of* his intentional and wilful misconduct, he shall not receive compensation under the provisions of this act." (emphasis supplied) MCL 418.305; MSA 17.237(305).

Section 305 retains exactly the same meaning with the use of the less wordy and more direct prepositional phrase *because of*, "[i]f the employee is injured *because of* his intentional and wilful misconduct, he shall not receive compensation under the provisions of this act." Certainly, the person or actor of the event who is the subject is and remains *the employee* who is identified at the beginning of the clause *if the employee is injured*. The event which is the object of the clause is and remains the injury following the verb *is if the employee is injured*. And the direct cause for this event is and remains the phrase *intentional and wilful misconduct*. Only the style of the introduction changes, changing the prepositional phrase which introduces the object clause *his intentional and wilful misconduct* from *by reason of* to *because of*.

The purpose or meaning of *by reason of* or *because of* is to convey the idea that a particular current event, which is the *injury*, was the outcome or result of a particular prior cause, which is the object clause *his intentional and wilful misconduct* which is introduced by these prepositional phrases. This is the standard definition of *because*. *Webster's*, 164. Indeed, the etymology of the word *because* reflects this. *Because* is only the contemporary rendering of *by-cause*. *Dictionary of Etymology*, 85.

By reason of or *because of* do not convey the idea of time or the temporal proximity of the event of the injury. The idea of the time of an event is conveyed by the adverbs *when*, *as*, *before*, and *after* and prepositional phrases such as *at the time of* and *in the course of*. The Court has had occasion to recognize this. *Toy ex rel Elliott v Voelker*, 273 Mich 205; 262 NW 181 (1935). In the case of *Toy ex rel Elliott*, *supra*, 220, the Court observed that,

""[w]hen' has no fixed meaning. It is an adverb of time. The ordinary meaning is 'at the time of' or 'after,' according to the context. 68 C.J. p. 244. Because of the difficulty or impossibility of doing two acts at once, and as the law does not deal in split seconds of time, the word is to be given a sensible construction in the law, as to the time of doing the acts, and sometimes it may mean a 'reasonable time after.' It does not mean 'before.' To give it the effect of 'before' in the above statute plainly is unnatural and inadmissible because it is used to designate the time at which the duty to give the bond arises."

Also, the Court recognized the real difference between the idea of cause conveyed by the prepositional phrase *out of* and the idea of time conveyed by the prepositional phrase *in the course of* in the case of *Dent v Ford Motor Co*, 275 Mich 39; 265 NW 518 (1936). The Court said in the case of *Dent, supra*, 41, that,

"[i]n *Hopkins v. Michigan Sugar Co.*, 184 Mich. 87 (L. R. A. 1916 A, 310), we pointed out two separate questions to be determined by different tests in order to find that an injury arose out of as well as in the course of employment, as follows:

' 'Out of' points to the cause or source of the accident, while 'in the course of' relates to time, place, and circumstances.' "

This distinction between the cause for an event, which is conveyed by the phrases *by reason of* and *because of*, and the time of an event, which is conveyed by the prepositional phrases *at the time of* and *in the course of*, may be illuminated from common aphorisms. The idea that an ancient event can be the cause of a current circumstance is manifest by the aphorism "his past came back to haunt him." For example, no one could deny that George O'Leary lost the job as Head Coach of the football team at the University of Notre Dame *by reason of* the ancient misconduct when preparing a résumé. Indeed, the parallels between the Employee and George O'Leary are compelling. Both perpetrated *intentional and wilful misconduct* as the Employee propositioned women and George O'Leary fabricated credentials on a résumé. Both events had no consequence *at the time of* the misconduct, as the Employee continued with work, and George O'Leary obtained and maintained work as a football coach at Georgia Tech, but both later found that earlier

intentional and wilful misconduct was the reason for an investigation, disclosure and loss of employment.

The Court of Appeals said that the prepositional phrase in section 305 *by reason of* means *at the time of* by stating that the Employee "was not injured at the time of [the] act [of misconduct]. * * * injury did not occur by reason of [this] conduct." *Daniel v Dep't of Corrections*, 248 Mich App 95, 103; 638 NW2d 175 (2001). (39a) This was wrong. First, this contravened the statute which explicitly requires that statutes must be afforded "the common and approved usage of the language." MCL 8.3a; MSA 2.212(1). Section 8.3a states that,

"[a]ll words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning."

This rule applies to section 305, which is a statute that is subject to section 8.3a by MCL 8.3; MSA 2.212, which states that, "[i]n the construction of the statutes of this state, the rules stated in sections 3a to 3w shall be observed, unless such construction would be inconsistent with the manifest intent of the legislature." There is no intent which is manifest in section 305 that suggests disregarding the standard English usage of the prepositional phrase *by reason of*. Certainly, no statute in the WDCA or elsewhere defines *by reason of* as *at the time of*.

Second, the cases of *Crilly v Ballou*, 353 Mich 303; 91 NW2d 493 (1958) and *Andrews v General Motors Corp*, 98 Mich App 556; 296 NW2d 309 (1980) which were cited by the Court of Appeals in *Daniel, supra*, 103 (39a) do not define *by reason of* as *at the time of*. *Crilly, supra*, and *Andrews, supra*, do not address the meaning of *by reason of* at all. Instead, *Crilly, supra*, and *Andrews, supra*, describe the object clause of section 305 which is *his intentional and wilful misconduct*. In the case of *Andrews, supra*, 558-559, the

Court of Appeals recapitulated the ruling by the Court in the case of *Crilly, supra*, by stating that,

"[i]n *Crilly v Ballou*, 353 Mich 303, 327; 91 NW2d 493 (1958), the Michigan Supreme Court specifically overruled the case of *Tarpper v Weston-Mott Co*, 200 Mich 275; 166 NW 857 (1918), and held that injuries received in assaults, whether they are sportive or malicious, are not beyond the realm of compensability if they arise out of the employment and are received in the course thereof. The Court did exclude from coverage those actions which are 'of such gross and reprehensible nature as to constitute intentional and willful misconduct'. *Crilly, supra*, 327. The Court declined to mark out a precise line of demarcation for acts involving a degree of 'moral turpitude', leaving that delineation for a case-by-case determination. The example given for a case to be excluded by its willful and wanton nature was *Federal Underwriters Exchange v Samuel*, 138 Tex 444; 160 SW2d 61 (1942), wherein the assailant-claimant armed himself with an iron bar and a knife and attacked a fellow employee, and was injured when that person defended himself.

The *Crilly* Court specifically considered, then rejected, making the question of compensation turn on whether or not the claimant was the aggressor. *Crilly, supra*, 321-324."

Nowhere did the Court in *Crilly, supra*, or the Court of Appeals in *Andrews, supra*, consider the meaning of the prepositional phrase *by reason of* which introduces the object-clause *his intentional and wilful misconduct*.

Finally, the truly important consequence of the decision by the Court of Appeals is the amendment of a statute by a court because the subordinate clause of section 305 was changed

FROM

if an employee is injured
by reason of
his intentional and wilful misconduct

TO

if an employee is injured
at the time of
his intentional and wilful misconduct

While a court may clarify or illuminate the meaning of a word or phrase in a statute, a court may never expunge the text of a statute to substitute new terms. *Paye v City of Grosse Pointe*, 279 Mich 254; 271 NW 826 (1937). *Robertson v DaimlerChrysler Corp*, 465 Mich 732; 641 NW2d 567 (2002). In the case of *Paye*, *supra*, 259-260, the Court held that,

"[w]e hardly supposed that anyone doubted that the construction of a statute or ordinance is a matter of law and not of fact. This is a well-recognized judicial function. It is the duty of courts to construe the language of the statute and while 'the construction given to a statute by those charged with the duty of executing it always entitled to the most respectful consideration and ought not to be overruled without cogent reasons,' such construction is not binding upon the courts. *Boyer-Campbell Co. v. Fry*, 271 Mich. 282 (98 A.L.R. 827), and authorities therein cited at pages 296, 297."

And in *Robertson*, *supra*, 748, the Court reiterated this by stating that,

". . . this Court's primary purpose is to discern and give effect to the Legislature's intent. *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 27; 528 NW2d 681 (1995). The first criterion in determining intent is the specific language of the statute. *DiBenedetto*, *supra* at 402. The Legislature is presumed to have intended the meaning it has plainly expressed, and if the expressed language is clear, judicial construction is not permitted and the statute must be enforced as written. *Id.* Additionally, it is important to ensure that words in a statute not be ignored, treated as surplusage, or rendered nugatory. *Hoste v Shanty Creek Management, Inc*, 459 Mich 561, 574; 592 NW2d 360 (1999). Unless defined in the statute, every word or phrase of a statute will be ascribed its plain and ordinary meaning. See MCL 8.3a. See also *Western Mich Univ Bd of Control v Michigan*, 455 Mich 531, 539; 565 NW2d 828 (1997)."

Plainly, the Court of Appeals defied this by redacting the prepositional phrase of *by reason of* or *because of* in section 305 from a causal function to *at the time of* which is a temporal function that is not connected to cause.

RELIEF

Wherefore, amici curiae Michigan Manufacturers' Association and Michigan Self-Insurers' Association pray that the Supreme Court reverse the opinion of the Court of Appeals.

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